

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

HELEN POLITZ

PLAINTIFF

v.

Civil Action No.: 1:08cv18-LTS-RHW

**NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, U.S. SMALL
BUSINESS ADMINISTRATION, AND
JOHN DOES 1 THROUGH 10**

DEFENDANTS

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY’S RESPONSE IN
OPPOSITION TO PLAINTIFF’S MOTION TO STAY PROCEEDINGS**

COMES NOW Defendant Nationwide Mutual Fire Insurance Company (“Nationwide”), by and through counsel, and hereby files its Response in Opposition to Plaintiff’s Motion to Stay Proceedings. In support of this Response, Nationwide states as follows:

1. Just one month before the trial of this matter is to begin — a trial date already continued three months due to Plaintiff’s sanctioned discovery abuses — Plaintiff now asks that this Court stay proceedings in this matter in order to await the Mississippi Supreme Court’s ruling in *Corban v. United Services Automobile Association*, No. 2008-IA-00645-SCT (Miss. 2008), *on appeal*, No. A2401-06-04 (Harrison Cty.), regarding the validity and interpretation of the anti-concurrent causation provisions in insurer USAA’s homeowners policy. (May 8, 2009 Mot. to Stay Proceeding at 1 (Dkt. 277).) Plaintiff’s motion for a stay implicitly is premised on her confidence that the Mississippi Supreme Court will disagree with the Fifth Circuit’s well-reasoned opinion in *Leonard* regarding the anti-concurrent causation clause. Nationwide submits that such confidence is misplaced, but nevertheless, Nationwide does not believe that a stay is warranted regardless of the outcome in the *Corban* case. Simply put, Plaintiff cannot “make out

a clear case of hardship or inequity in being required to go forward” as she must under *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). Accordingly, the Court should deny Plaintiff’s motion and allow this case to proceed to its (overdue) trial.

2. **First**, and perhaps most importantly, Plaintiff would have the Court postpone trial indefinitely merely to await a decision which, in any event, will not have a decisive impact on the merits of **this** case. Plaintiff greatly overstates the potential significance of the Mississippi Supreme Court’s interpretation of the anti-concurrent causation clause for the outcome here. It simply is false that “whether the ACC clause is applicable and/or excludes coverage on Plaintiff’s loss constitutes Nationwide’s entire argument as to why it failed to pay Plaintiff’s claim” (Mot. to Stay at 1) (emphasis in original.) Nationwide denied Plaintiff’s claim because after inspecting the property and reviewing relevant physical and meteorological data, the engineers Nationwide retained to assist in determining the cause of Plaintiff’s loss concluded that the home had been inundated with water and that “[t]he referenced structure was razed by a combination of forces that consisted primarily of hurricane induced storm surge, wind-driven waves, and the impact of floating debris.” (See Jan. 7, 2009 Nationwide’s Mem. of Auths. in Supp. of Mot. for Summ. J. at 7 (Dkt. 159) (citing Nov. 29, 2005 HSA Engineers & Scientists / Conestoga-Rovers & Assocs. Report at NW-POL000286).) Nationwide accordingly relied on the flood exclusion in Nationwide’s policy. (See *id.* (citing Jan. 10, 2006 Partial Denial Letter).)

3. Nationwide also invoked the anti-concurrent causation clause because, to the extent there was wind that damaged Plaintiff’s property concurrently or in any sequence with the (excluded) flooding, such damage, too, was excluded from coverage under the policy. To be sure, Nationwide subsequently issued Plaintiff a payment of \$30,339.57 in July 2007, during a period when Nationwide was appealing this Court’s determination that the anti-concurrent

causation clause was unenforceable. Regardless of whether or not Nationwide was obligated to tender this payment, the fact remains that it was based on an estimate of the potential wind damage that arguably could have occurred prior to the house being razed by storm surge. Thus, Nationwide's position in this litigation is that, putting aside the operation of the anti-concurrent causation clause, Plaintiff has been fully compensated for any conceivable wind damage to her property — a far cry from relying on the anti-concurrent causation provision as its “entire argument” for its partial denial of Plaintiff's claim. This straightforward issue will not be disturbed by a decision in the *Corban* case either way. *See Continental Cas. Co. v. McAllen Indep. School Dist.*, 850 F.2d 1044, 1046-1047 (5th Cir. 1988) (affirming district court's refusal to stay proceedings in favor of pending state court action, where insurer's declaratory judgment action seeking determination of liability presented would not be impacted decisively by state court decision).

4. **Second**, whatever decision the Mississippi Supreme Court reaches in *Corban* will have virtually no impact on Plaintiff's meritless bad faith and punitive damages claims. Nationwide's reliance upon the anti-concurrent causation clause cannot serve as the basis for a bad faith or punitive damages award to Plaintiff. This Court held in ruling on Nationwide's Motion for Summary Judgment that “[it did] not believe an insurer can be found to be negligent or to be acting in bad faith when it is following a reasonable interpretation of its policy language, even if its interpretation is not adopted by the courts.”¹ (*See* Mar 27, 2009 Mem. Op. on Def.'s

¹ Of course, Nationwide's interpretation of the anti-concurrent causation provision *was* adopted by the Fifth Circuit. *See Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1893 (2008) (“Contrary to the district court's ruling, Nationwide's ACC clause is not ambiguous. ... The clause unambiguously excludes coverage for water damage ‘even if another peril’ - e.g., wind - ‘contributed concurrently or in any sequence to cause the loss.’ The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that ‘occurred concurrently or in sequence with the excluded water damage.’”) (citation omitted); *see also Pantanelli v. State Farm Fire & Cas. Co.*, 304 F. App'x 290 (5th Cir. 2008) (unequivocally reaffirming the validity of State Farm's similar anti-concurrent causation clause).

Mots. for Summ. J. and to Strike Pls.’ Claims for Emotional Distress at 6 (Dkt. 252); *see also Sanders v. Nationwide Mut. Fire Ins. Co.*, Civ. A. No. 1:07-CV988-LTS-RHW, 2008 WL 5095991, *2 (S.D. Miss. Nov. 24, 2008) (“Because there is a dispute about what damage was caused by storm surge flooding, I do not believe Nationwide’s reliance on this provision constitutes bad faith.”.) And even were the Mississippi Supreme Court to rule that the anti-concurrent causation provisions were ambiguous and unenforceable, that court’s recent precedent makes clear that such a ruling on its own cannot support a bad faith claim. In *United States Fidelity and Guaranty Co. of Mississippi v. Martin*, 998 So. 2d 956 (Miss. 2008), the contractual provision on which the insurer had relied in denying coverage was found ambiguous. The Mississippi Supreme Court held that “[a]ccordingly, it follows that an insurance company could legitimately deny coverage under a policy that has ambiguous provisions for coverage” and therefore the trial court’s grant of summary judgment against the plaintiff’s bad faith claim was proper. *United States Fid. & Guar. Co. of Miss.*, 998 So. 2d at 971. The Court explained that while the insurer “may have incorrectly denied [the plaintiff’s] claim,” the plaintiff “did not produce any evidence that [the insurer’s] conduct constituted willful conduct in bad faith, thus failing to meet [the plaintiff’s] ‘heavy burden.’” *Id.* The same result should be reached in this case regardless of any decision in *Corban*.

5. **Third**, nothing about a stay of proceedings here would promote the goals of judicial economy and efficiency and fairness for the parties that *Landis* stays target. *See Landis*, 299 U.S. at 254-55. Plaintiff urges a delay of an unspecified length: the Mississippi Supreme Court will only hear oral argument in the *Corban* case on June 9, just two weeks before trial in this matter is to begin. No one can predict when that Court will issue its ruling, but it could easily take many months. It bears emphasis that the only reason why **oral argument** (not a

decision) in *Corban* is at all close to the trial of this case is that Plaintiff's abuse of her discovery obligations required a continuance of the trial date from March until June. (See Jan. 26, 2009 Order (Dkt. 166)) (observing that "Plaintiff's counsel makes a habit" of seeking repeated extensions and that "[n]o matter how many guises are used (usually as a part of additional discovery, *a formal request for a continuance of the trial date is made*, or must be implied from the nature of the relief sought) delay is the unavoidable result. *This should not be the case this far into Hurricane Katrina litigation.*") (emphasis added.)

6. Moreover, following Plaintiff's reasoning to its logical conclusion, practically all remaining Hurricane Katrina cases (certainly any cases involving disputed wind versus water causation issues in which a homeowners insurance policy's anti-concurrent causation provision is at issue) should *also* be postponed indefinitely until the Mississippi Supreme Court issues a ruling in *Corban*. If a stay were granted here, it would be unsurprising if many, and perhaps most, plaintiffs in such cases demand similar stays of their own cases until *Corban* is decided. Such a dramatic upheaval of the existing docket of Katrina-related cases is unwarranted and contrary to the goal of efficient and fair resolution of legal proceedings.

7. Because relevant legal authorities have been provided in the Motion itself, Nationwide respectfully requests that the Court waive its usual requirement that a separate memorandum of authorities to be filed. See Uniform Local Rule 7.2.

WHEREFORE, PREMISES CONSIDERED, Nationwide respectfully requests that Plaintiff's Motion to Stay Proceeding be denied.

THIS, the 12th day of May, 2009.

Respectfully submitted,

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY, Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This, the 12th day of May, 2009.

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